BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA S. BAUER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,383
MORAN MANOR	)	
Respondent	)	
AND	)	
	)	
SAFETY NATIONAL CASUALTY CORP.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the February 8, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

In the February 8, 2010 preliminary hearing Order, the ALJ denied claimant's request for medical treatment based on the report of Dr. Paul S. Stein. The ALJ further concluded that the notice defense was moot in light of Dr. Stein's report.

The claimant requests review of the preliminary hearing Order and first alleges the ALJ erred in finding that claimant's accidental injury did not arise out of and in the course of her employment with the respondent. Second, claimant alleges notice was timely. Finally, claimant asks the Board to reverse the ALJ and grant her medical treatment, in particular a right total knee replacement, and payment of medical expenses.

Respondent and its insurance carrier (respondent) assert the ALJ's preliminary hearing Order dealt with only a treatment issue, which is not a jurisdictional issue. Accordingly, respondent contends the appeal should be dismissed pursuant to K.S.A. 44-534a(a)(2). In addition the respondent argues, if the Board determines the appeal involves an appealable issue, the Board should affirm the ALJ's denial of claimant's request for medical treatment and second, the Board should find notice was not timely because claimant's testimony regarding this issue is not credible.

The issues are:

- Whether the Board has the jurisdiction to hear this appeal.
- Whether claimant sustained personal injury by accident arising out of and in the course of her employment with the respondent.
- Whether notice was timely.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded the judge's jurisdiction. See K.S.A. 2009 Supp. 44-551.

The claimant's request for review indicates the ALJ erred in finding the claimant's accidental injury did not arise out of and in the course of her employment with the respondent.[1]

The ALJ's preliminary hearing Order reveals no such finding or conclusion in its language; however, it is implicit in his Order. The Order reads, in part:

> Based [on] the IME report of Dr. Stein, the Claimant's request for treatment is denied. The notice defense is moot in . . . light of Dr. Stein's report.[2]

The ALJ based his denial of medical treatment on Dr. Stein's opinions. Since Dr. Stein recommended medical treatment, the only logical interpretation of the ALJ's

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[1] Claimant's application for review actually reads: "The Claimant alleges that the Administrative Law Judge erred in his finding that the Claimant met with personal injury by accident arising out [of] and in the course of her employment." Application for Review at 1. Common sense tells us that the claimant meant to state that the ALJ erred in his finding that the claimant did not meet with personal injury by accident arising out of and in the course of her employment.

[2] ALJ Order (Feb. 8, 2010).

denial of medical treatment is that the ALJ implicitly concluded that the claimant's personal injury did not arise out of and in the course of her employment with the respondent. Therefore, the Board has jurisdiction to review the February 8, 2010 preliminary hearing Order.

Claimant is a registered nurse who was working as a charge nurse for the respondent, a nursing home facility. Her employment with respondent commenced on August 16, 2007, and ended on September 26, 2007, when the claimant resigned.[3] Claimant testified she felt something pop in her knee while she was repositioning a patient in a wheelchair at respondent's facility and she had severe pain.[4] She also testified that being on her feet, stooping, bending and performing the regular duties of a nurse caused her knee condition to get worse as she continued working for respondent.

This is not the first time claimant has had right knee problems. Before working for respondent, claimant injured her right knee while working for Mt. Carmel.[5] This resulted in an arthroscopic surgery of her right knee by Dr. Matt Dumigan on February 6, 2007.[6] Claimant continued to have difficulty with her right knee despite postoperative physical therapy and Synvisc injections.[7] Claimant received follow-up care from Dr. Dumigan's office through the end of October 2007.

In March 2008, claimant sought treatment from orthopedic surgeon Dr. William L. Dillon. The doctor ordered x-rays, noted arthritis of the knee and prescribed medication.

At the request of her attorney, claimant was evaluated by Dr. Edward J. Prostic in September 2008. Dr. Prostic opined that claimant had progressive osteoarthritis of her right knee.[8] He also opined that claimant needed to continue with anti-inflammatory medication and that claimant would require total knee replacement arthroplasty to regain comfort.[9]

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[3] P.H. Trans., Resp. Ex. 3.

[4] *Id.*, at 9.

[5] *Id.*, at 8.

[6] *Id.*, Resp. Ex. 6.

[7] *Id.*, Cl. Ex. 2.

[8] *Id.*

[9] *Id.*

In December 2008, the ALJ ordered an IME. Dr. Thomas P. Phillips conducted the IME on January 26, 2009. Dr. Phillips opined that the claimant had degenerative arthritis of her right knee due mainly to avascular necrosis from a lesion that was present on x-rays in April 2007 and an MRI performed before her arthroscopic surgery. In addition, he opined that claimant's work at Moran Manor permanently aggravated a preexisting condition in her right knee.[10]

Respondent sent claimant to see Dr. J. Christopher Banwart on April 2, 2009. The x-rays Dr. Banwart ordered revealed grade 3 osteoarthrosis of the right knee.[11] Dr. Banwart opined claimant's condition already existed and already warranted knee replacement prior to claimant's employment with the respondent.[12]

On July 9, 2009, the ALJ ordered another IME, which was performed by Dr. Stein. Dr. Stein found claimant had degenerative disease of the right knee and some element of avascular necrosis. As to causation, the doctor opined the current requirement for a total knee replacement was predominantly related to claimant's preexisting situation. Dr. Stein also opined that there may have been some symptomatic aggravation of claimant's preexisting condition at Moran Manor.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[13] A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."[14] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[15] The existence, nature and extent of the disability of an injured workman is a question of fact.[16] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical

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[10] *Id.*, Cl. Ex. 1.

[11] *Id.*, Resp. Ex. 6.

[12] *Id.*

[13] K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[14] K.S.A. 44-501(a).

[15] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[16] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

condition.[17] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[18]

Additionally, it is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[19] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[20]

Based on the evidence compiled to date, namely, claimant's testimony and Dr. Phillips' medical opinion, this Board Member finds and concludes the claimant has sustained her burden of proof as to the issue of causation. Furthermore, Dr. Stein opined that there may have been some symptomatic aggravation of claimant's preexisting condition at Moran Manor.

Finally, both the respondent and claimant invite this Board Member to address the issue of whether notice was timely. This Board Member declines to decide the issue. The ALJ did not rule on this issue, reasoning the issue was moot. In light of this Board Member's preliminary finding that claimant suffered personal injury by accident arising out of and in the course of her employment with respondent, the issue is no longer moot. The issue of timely notice is remanded to the ALJ to decide.

CONCLUSION

Based on the record compiled to date, this Board Member concludes claimant suffered personal injury by accident arising out of and in the course of her employment with the respondent.

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[17] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[18] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[19] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[20] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[21] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, ALJ Klein's preliminary hearing Order of February 8, 2010, is reversed. The matter is remanded to the ALJ for proceedings in accordance with this Order.

IT IS SO ORDERED.

Dated this ____ day of April, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Blake Hudson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[21] K.S.A. 44-534a.